

Message Text

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C O N F I D E N T I A L SECTION 1 OF 2 GENEVA 7517

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E.O. 11652: GDS

TAGS: CSCE, PFOR, XG

SUBJECT: CSCE POLICY: POTENTIAL LEGAL DIFFICULTIES WITH RESPECT
TO THE HUMAN CONTACTS TEXT

1. BEGIN SUMMARY. THE ALLIES AND NEUTRALS NOW FAVOR LEVEL OF COMMITMENT LANGUAGE THAT MIGHT OBLIGE US TO CONSIDER THE HUMAN CONTACTS TEXT AS A LEGALLY BINDING DOCUMENT RATHER THAN A DECLARATION OF INTENT. WE HAVE CONSULTED ALLIED DELEGATIONS HERE ON THE PROBLEM. THEY RESPONDED THAT THEIR GOVERNMENTS DO NOT RPT NOT CONSIDER THE LANGUAGE IN QUESTION WOULD MAKE THE HUMAN CONTACTS TEXT A LEGALLY BINDING INSTRUMENT AND URGED THAT WE INTERPRET IT SIMILARLY. MEANWHILE, SOVIETS HERE HAVE LEARNED THAT WE MAY HAVE LEGAL PROBLEMS WITH HUMAN CONTACTS TEXTS AND HAVE QUERIED US ABOUT IT. THIS MESSAGE OUTLINES LEGAL PROBLEM AS WE SEE IT AND USDEL ACTIONS TO DATE. IN EVENT DEPARTMENT DECIDES IT MUST CONSIDER HUMAN CONTACTS TEXT AS AN AGREEMENT, WE ALSO SUGGEST FOUR POSSIBLE APPROACHES TO PROBLEM--ALL OF WHICH ENTAIL SOME RISK OF POLITICALLY DAMAGING CONSEQUENCES. REQUEST GUIDANCE. END SUMMARY.

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THE PROBLEM

2. IT HAS BECOME APPARENT THAT THE ALLIES WILL WANT A LEVEL OF COMMITMENT FORMULA IN THE HUMAN CONTACTS PREAMBLE OF A TYPE THAT MIGHT OBLIGE US TO REGARD THAT TEXT AS AN AGREEMENT, NOT SIMPLY A DECLARATION OF INTENT. THIS WOULD IN TURN RESURRECT OUR DIFFICULTIES WITH RESPECT TO THE CONFLICT BETWEEN US LAW AND THE COMPETENCE OF THE FEDERAL GOVERNMENT AND THE PROVISIONS OF THE FAMILY REUNIFICATION PAPER. WE COULD NO LONGER ARGUE THAT THIS PAPER SIMPLY ENUNCIATES DESIRABLE BUT OPTIONAL POLITICAL GOALS.

3. PARAGRAPH 9 OF THE FAMILY REUNIFICATION PAPER, AS DEPARTMENT WILL RECALL, WOULD HAVE RECEIVING PARTICIPATING STATES "SEE THAT" IMMIGRANTS ARRIVING UNDER FAMILY REUNIFICATION PROVISIONS ARE "AFFORDED OPPORTUNITIES EQUAL TO THOSE ENJOYED BY ITS OWN CITIZENS FOR EDUCATION, MEDICAL ASSISTANCE AND SOCIAL SECURITY." US LAW PROVIDES BENEFITS TO PERMANENT RESIDENTS UNDER CERTAIN MEDICARE AND SOCIAL SECURITY PROGRAMS ONLY AFTER FIVE YEARS OF PERMANENT RESIDENCE. MOREOVER, MANY EDUCATIONAL AND MEDICAL ASSISTANCE OPPORTUNITIES ARE OFFERED BY THE STATES OR PRIVATE INTERESTS AND ARE NOT UNDER THE CONTROL OF THE USG. SIMILAR PROBLEMS ARISE IN THE MARRIAGE PAPER (I.E., LACK OF FEDERAL JURISDICTION OVER ISSUANCE OF MARRIAGE DOCUMENTS--GENEVA 7384).

4. THE CURRENT DRAFT INTRODUCTION TO THE HUMAN CONTACTS PREAMBLE, SUPPORTED BY MOST ALLIES AND NEUTRALS AS A BASIS FOR NEGOTIATION WITH THE SOVIETS, HAS THE FOLLOWING LANGUAGE RELATING TO LEVEL OF COMMITMENT: "TO THESE ENDS THEY DECLARE THEMSELVES RESOLVED TO TAKE APPROPRIATE MEASURES, AS WELL AS TO CONCLUDE, AS NECESSARY, ARRANGEMENTS AMONG THEM, AND EXPRESS THE INTENTION TO APPLY FROM NOW ON THE FOLLOWING:". THE PROVISIONS WHICH FOLLOW WOULD STATE IN DETAIL THE VARIOUS MEASURES WHICH PARTICIPATING STATES "WILL" TAKE. SUCH LANGUAGE, WE BELIEVE, MIGHT BE REGARDED AS CONSTITUTING AN AGREEMENT UNDER USUAL USG PRACTICE.

5. HOWEVER, A NUMBER OF OUR ALLIES (AND APPARENTLY MOST CONFIDENTIAL

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PARTICIPANTS HERE) INSIST THAT SUCH LANGUAGE CAN BE CONSIDERED A DECLARATION OF INTENT AND NOT A LEGALLY BINDING AGREEMENT. MANY OF OUR ALLIES HAVE STRONGLY URGED THAT WE TAKE A SIMILAR APPROACH TO AVOID REOPENING, AND PERHAPS WEAKENING, BASKET III TEXTS THAT HAVE BEEN WORKED OUT AFTER DIFFICULT NEGOTIATIONS AND TO WHICH OUR PRINCIPAL ALLIES ATTACH CONSIDERABLE POLITICAL IMPORTANCE.

6. THE SIMPLEST WAY OUT OF OUR DIFFICULTY WOULD BE TO FOLLOW OTHER WESTERN PARTICIPANTS IN THIS AND TREAT THE HUMAN CONTACTS TEXT AS SOMETHING LESS THAN A JURIDICALLY BINDING INSTRUMENT. HOWEVER, IF THE DEPARTMENT BELIEVES IT CANNOT TAKE SUCH A POSITION, WE OUTLINE IN PARAS 9 THROUGH 17 BELOW FOUR OTHER POSSIBLE APPROACHES TO THIS PROBLEM--ALL OF WHICH CARRY SOME RISK OF DAMAGING POLITICAL CONSEQUENCES.

7. IN THIS CONNECTION, IT MIGHT APPEAR THAT THE SO-CALLED FINNISH COMPROMISE COULD PROTECT OUR INTERESTS. HOWEVER, WE DO NOT BELIEVE SUCH AN INTERPRETATION OF THE RELEVANT TEXTS WOULD STAND UP UNDER CAREFUL ANALYSIS. IT WAS OF COURSE AGREED LAST JULY THAT THE PREAMBLE TO TEXTS UNDER THE THIRD AGENDA ITEM WILL PROVIDE INTER ALIA THAT COOPERATION IN THIS FIELD "SHOULD TAKE PLACE IN FULL RESPECT FOR THE PRINCIPLES GUIDING RELATIONS AMONG PARTICIPATING STATES AS SET FORTH IN THE RELEVANT DOCUMENT". THE PRINCIPLE ON SOVEREIGN EQUALITY, IN TURN, WILL INCLUDE LANGUAGE PLEDGING PARTICIPANTS TO "RESPECT EACH OTHER'S RIGHT TO CHOOSE AND DEVELOP ITS POLITICAL, SOCIAL AND ECONOMIC SYSTEMS AS WELL AS ITS RIGHT TO DETERMINE ITS LAWS AND REGULATIONS". HOWEVER, THE TENTH PRINCIPLE WILL INCLUDE FOLLOWING LANGUAGE: "IN EXERCISING THEIR SOVEREIGN RIGHTS, INCLUDING THE RIGHT TO DETERMINE THEIR LAWS AND REGULATIONS, THEY WILL CONFORM WITH THEIR LEGAL OBLIGATIONS UNDER INTERNATIONAL LAW; THEY WILL FURTHERMORE PAY DUE REGARD TO AND IMPLEMENT THE PROVISIONS OF THE FINAL DOCUMENT/DOCUMENTS OF THE CSCE." THUS THE ABOVE SENTENCE, TO BE INCLUDED IN THE TENTH PRINCIPLE, WOULD ON ITS FACE UNDERMINE THE ARGUMENT THAT NATIONAL LAWS AND REGULATIONS OVERRIDE BASKET III COMMITMENTS.

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8. MOREOVER, IF THE USG SHOULD ENDEAVOR TO PROTECT ITS LEGAL POSITION BY REFERENCE TO THE LAWS AND REGULATIONS LANGUAGE IN THE SOVEREIGN EQUALITY PRINCIPLE, IT WOULD PUT US ON THE SOVIET SIDE OF THIS CONTENTIOUS ISSUE AND FLY IN THE FACE OF THE GENERAL WESTERN POSITION THAT BASKET III UNDERTAKINGS ARE NOT RPT NOT LIMITED IN SCOPE BY EXISTING NATIONAL ALWS AND REGULATIONS.

OTHER POSSIBLE APPROACHES

9. A. WEAKEN THE LEVEL OF COMMITMENT. ONE WAY OUT OF OUR DIFFICULTY WOULD BE TO PROPOSE WEAKER COMMITMENT LANGUAGE IN THE HUMAN CONTACTS TEXT THAN THAT CITED ABOVE. THE FOLLOWING ARE ROUGH ILLUSTRATIVE EXAMPLES:

--"THEY DECLARE THEIR FIRM INTENTION TO BE GUIDED BY THE

FOLLOWING RECOMMENDATIONS;" OR
--"THEY RESOLVE THAT THEY WILL BE GUIDED BY THE FOLLOWING
GOALS:"

10. HOWEVER, OUR PRINCIPAL ALLIES WOULD UNDOUBTEDLY OBJECT
TO A WEAKENING OF THE COMMITMENT BECAUSE THEY, OF COURSE,
WANT LANGUAGE AS BINDING AS POSSIBLE ON THE SOVIETS.

11. B. USE OF "WITHIN THEIR COMPETENCE" LANGUAGE. INSERTION OF SUCH
A PHRASE IN THE HUMAN CONTACTS PREAMBLE, OR IN OPERATIVE
PARAGRAPHS THAT GIVE US PROBLEMS, WOULD

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C O N F I D E N T I A L SECTION 2 OF 2 GENEVA 7517

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HELP TO MEET OUR DIFFICULTIES BY RELIEVING US OF ANY
OBLIGATIONS FOR STATE OR PRIVATE ACTIONS CONTRARY TO
THE PROVISIONS OF THE TEXTS. IN EFFORTS MADE TO DATE,
THE ALLIES HAVE OPPOSED THIS SOLUTION. THEY EXPRESSED
CONCERN THAT THE SOVIETS WOULD SEIZE UPON THIS AS A PRETEXT
FOR INTRODUCING THEIR OWN CAVEATS INTO THE TEXT.

12. C. OTHER AMENDMENTS TO OPERATIVE LANGUAGE. WE COULD MEET
OUR PROBLEMS IN THE FAMILY REUNIFICATION TEXT BY

AMENDING PARA 9 AS FOLLOWS (DELETION IN PARENTHESIS;
ALTERNATIVE SUBSTITUTIONS UNDERLINED):
"THE RECEIVING PARTICIPATING STATE WILL TAKE APPROPRIATE CARE WITH REGARD TO EMPLOYMENT FOR PERSONS FROM OTHER PARTICIPATING STATES WHO TAKE UP PERMANENT RESIDENCE IN THAT STATE IN CONNEXION WITH FAMILY REUNIFICATION WITH ITS CITIZENS AND (SEE THAT THEY ARE AFFORDED OPPORTUNITIES) BEGIN UNDERLINE WITH REGARD TO AFFORDING OPPORTUNITIES/ENCOURAGE OPPORTUNITIES FOR THEM END UNDERLINE EQUAL TO THOSE ENJOYED BY ITS OWN CITIZENS FOR EDUCATION, MEDICAL ASSISTANCE AND SOCIAL SECURITY."

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13. IF WE PUT THIS FORWARD LATE IN THE DAY--WHEN MOST CONFERENCE TEXTS ARE PRACTICALLY WRAPPED UP--THE SOVIETS MIGHT NOT DEMAND COMPENSATING AMENDMENTS ELSEWHERE THAT WOULD REOPEN THE VARIOUS INTERLOCKING TRADEOFFS AND THUS DELAY CONCLUSION OF STAGE II. WE WOULD EXPLAIN, OF COURSE, THAT OUR DIFFICULTY IS NOT POLITICAL BUT TECHNICAL AND CONSTITUTIONAL IN NATURE. A SIMILAR SOLUTION WOULD BE SOUGHT IN THE MARRIAGE TEXT, AND IF OPERATIVE LANGUAGE DEVELOPED IN OTHER BASKET III TEXTS GIVES US LEGAL PROBLEMS, WE COULD ALSO PROPOSE AMENDMENTS, AT THE LAST MINUTE.

14. HOWEVER, AN EFFORT TO INSERT SUCH AMENDMENTS AT AN EARLIER STAGE COULD WELL PROMPT THE SOVIETS TO SEEK COMPENSATION, AT ALLIED EXPENSE, IN OTHER PARTS OF THE TEXT. OUR ALLIES, ANTICIPATING SUCH A SOVIET REACTION, WOULD STRONGLY RESIST ANY SUCH US AMENDMENTS IF WE SHOULD PUT THEM FORWARD IN THE NEAR FUTURE.

15. D. A US INTERPRETIVE STATEMENT. A FORMAL US INTERPRETIVE STATEMENT ON CERTAIN PORTIONS OF BASKET III TEXTS COULD ALSO MEET OUR LEGAL PROBLEMS. IF WE PROPOSED SUCH A DISCLAIMER NOW, HOWEVER, THE SOVIETS WOULD BE STRONGLY TEMPTED TO USE THIS AS A PRECEDENT FOR WEAKENING THEIR OWN COMMITMENTS UNDER BASKET III. THUS WE ARE CERTAIN THE ALLIES WOULD STRONGLY URGE US TO REFRAIN FROM THIS DEVICE IN THE NEAR FUTURE.

16. AT A LATER STAGE, HOWEVER, WHEN MOST BASKET III (AND OTHER) TEXTS HAVE BEEN PROVISIONALLY REGISTERED, AND THE SOVIETS SEE STAGE III WITHIN THEIR GRASP, THEY MIGHT THEN BE MORE INCLINED TO LET US SLIP IN AN INTERPRETIVE STATEMENT, WITHOUT INSISTING ON FOLLOWING SUIT THEMSELVES AND THEREBY UNDOING ALL THE COMPROMISES LABORIOUSLY WORKED OUT DURING STAGE II.

17. WE HAVE IN MIND READING A STATEMENT, WHICH COULD BE PRINTED IN THE DAILY JOURNAL, ALONG THE FOLLOWING LINES:

IT IS THE UNDERSTANDING OF THE USG THAT THESE PROVISIONS ARE NOT INTENDED TO ALTER EXISTING LAW AND DO NOT COMMIT THE USG TO TAKE ACTION REGARDING OPPORTUNITIES WHICH ARE NOT WITHIN ITS
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COMPETENCE.

ACTIONS BY US DELEGATION

18. WE HAVE ALREADY SOUNDED, PER INSTRUCTIONS, SEVERAL ALLIED DELEGATIONS BILATERALLY ON THE "WITHIN THEIR COMPETENCE" APPROACH. AS REPORTED, THEY ALL ASKED US NOT TO PROPOSE SUCH LANGUAGE IN THE FAMILY REUNIFICATION PAPER.

19. LATER, AT THE DECEMBER 5 NATO DELEGATION HEADS' CAUCUS, WHEN THE FRENCH INTRODUCED THE EARLIER VERSION OF THE DRAFT HUMAN CONTACTS INTRODUCTION WITH STRONG LEVEL OF COMMITMENT LANGUAGE, (GENEVA 7417), WE SAID THAT LANGUAGE WAS OF A SORT USUALLY EMPLOYED FOR AGREEMENTS, NOT DECLARATIONS, AND THAT IT WOULD CORRESPONDINGLY AGGRAVATE OUR PROBLEM WITH RESPECT TO SPECIFIC OPERATIVE PORTIONS OF THE HUMAN CONTACTS TEXTS. WE THEREFORE SUGGESTED, THIS TIME TO THE FULL NATO CAUCUS, PUTTING THE "WITHIN THEIR COMPETENCE" PHRASE IN THE HUMAN CONTACTS PREAMBLE. THERE WAS UNANIMOUS OPPOSITION, LED BY THE FRG AND CANADA, WHO SAID THE SOVIETS WOULD, IN RESPONSE, INSIST ON "WITHIN THEIR POSSIBILITIES", WHICH THE ALLIES COULD NOT ACCEPT. WE AGREED, ONCE MORE, TO HOLD OFF.

20. LATER, WE FLOATED IN THE BASKET III CAUCUS, ON DECEMBER 10 THE WEAKER LANGUAGE ON LEVEL OF COMMITMENT CITED IN PARA 9 ABOVE. ALLIED REPRESENTATIVES OBJECTED VIGOROUSLY, SAID THEIR GOVERNMENTS WOULD NOT INTERPRET THE HUMAN CONTACTS PREAMBULAR LANGUAGE AS ESTABLISHING A LEGALLY-BINDING INSTRUMENT, AND URGED US NOT TO INTRODUCE WEAKER LANGUAGE NOW. WE AGREED TO HOLD OFF FOR THE TIME BEING, PENDING WASHINGTON GUIDANCE.

21. THIS, HOWEVER, HAS HELPED TO PREPARE THE GROUND WITH THE ALLIES FOR LAST MINUTE AMENDMENTS TO THOSE OPERATIVE TEXTS THAT CAUSE PROBLEMS, OR A US INTERPRETIVE STATEMENT CONCERNING CERTAIN OF THE FINAL DOCUMENTS, IF THE DEPARTMENT BELIEVES ONE OF THOSE APPROACHES IS REQUIRED. FINALLY, DEPARTMENT SHOULD BE AWARE THAT SOVIET DELEGATION HAS GOTTEN WIND OF OUR LEGAL PROBLEMS AND RAISED MATTER
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AT LUNCH DEC 13. WE SAID IN RESPONSE THAT WE MIGHT HAVE SOME LEGAL PROBLEMS WITH HUMAN CONTACTS TEXTS, RELATING TO US FEDERAL SYSTEM. SOVIETS, WHO ARE ANXIOUS TO REGISTER INTRODUCTORY LANGUAGE FOR HUMAN CONTACTS BEFORE CHRISTMAS RECESS, PRESSED US FOR A DETAILED EXPLANATION OF OUR PROBLEM, BUT WE REPLIED THAT THIS QUESTION IS CURRENTLY UNDER REVIEW AND WE DO NOT YET HAVE DETAILED INSTRUCTIONS. SOVIETS NOTED THAT THEIR SYSTEM IS ALSO FEDERAL, AND THEY MAY HAVE PARALLEL SITUATION, WHICH THEY BELIEVE IS COVERED BY REFERENCE IN THE FIRST PRINCIPLE TO LAWS AND REGULATIONS (AS DISCUSSED ABOVE PARA 7).DALE

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